

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 31, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3586

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DEBRA PLUMMER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATES OF STEVEN R. PLUMMER, DECEASED, JUSTIN R. PLUMMER, DECEASED, TYLER J. PLUMMER, DECEASED, AND CASSANDRA JEAN PLUMMER, A MINOR, BY HER GUARDIAN AD LITEM, MICHAEL BERTLING,

PLAINTIFFS-APPELLANTS,

v.

DUANE TAYLOR,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Debra Plummer appeals a judgment dismissing her wrongful death action against Duane Taylor. Plummer's husband and two sons died in a fire at a residence they rented from Taylor. The trial court ruled that Taylor was negligent as a matter of law for failing to provide smoke detectors in the residence. It also ruled that Steven Plummer, Debra's husband, was negligent as a matter of law for having ingested marijuana earlier on the day of the fire. The jury found that the absence of the smoke detectors was not a substantial factor leading to the deaths, that Steven's ingestion of marijuana was a substantial factor, that Steven's conduct after the fire started was not negligent and that Debra's conduct was not negligent. Because the trial court improperly exercised its discretion when it allowed irrelevant and prejudicial evidence to be admitted and erred when it concluded that Steven was negligent per se based on his ingestion of marijuana, we reverse the judgment and remand the cause for a new trial.

The Plummers' three children were sleeping in an upstairs bedroom at the time of the fire. The fire started in another vacant upstairs bedroom. The Plummers had fallen asleep while watching television downstairs. They were alerted to the fire by their nephew who was staying with them and occupied another upstairs bedroom. Steven instructed the nephew to call the fire department while he and Debra attempted to save the children. The fire had damaged the telephone line and their nephew left the farm house and drove 1.1 miles to another house to call the fire department. When he returned three to seven minutes later, the Plummers had managed to save their daughter. Steven and their two sons died of smoke inhalation. Their bodies were found a few feet from the bedroom door, the children wrapped in blankets, suggesting that a few more seconds would have saved their lives.

Before trial, Debra filed a motion *in limine* that the trial court partially denied. The trial court allowed evidence that Steven was growing marijuana plants in the basement, that cocaine paraphernalia was found in the garden, that a “HIGH TIMES” magazine was found in the house and that Debra placed Steven’s marijuana pipe in his ashes after he was cremated.¹ We conclude that the trial court improperly exercised its discretion by allowing the jury to hear this evidence.

Evidence regarding the marijuana plants, drug paraphernalia, “HIGH TIMES” magazine and the marijuana pipe should have been excluded as irrelevant. Relevancy of evidence is a discretionary decision of the trial court. Discretion is not properly exercised when the trial court admits evidence that has little or no probative value and has a strong tendency to influence the outcome by improper means or appeals to the jury’s sympathy, sense of horror, instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions of the case. *See Bittner v. American Honda Motor Co.*, 194 Wis.2d 122, 146, 533 N.W.2d 476, 486 (1995); *Lease Am. Corp. v. Insurance Co. of N. Am.*, 88 Wis.2d 395, 401, 276 N.W.2d 767, 770 (1979). Taylor persuaded the trial court that the marijuana plants and drug paraphernalia were relevant because the defense theorized that the Plummers wasted time disposing of drug paraphernalia instead of saving their children. This theory was based entirely on speculation. The evidence of drugs and drug paraphernalia, other than Steven’s ingestion of marijuana earlier that day, did not tend to make

¹ The trial court also allowed testimony that Steven was impaired by ingesting marijuana on the date of the fire. Debra does not contest the admissibility of that evidence. The court granted Debra’s motion *in limine* to exclude any evidence or reference to her use of controlled substances. Nonetheless, Debra introduced evidence of her prior cocaine use.

the existence of a material fact more or less probable, but only invited the jury to engage in impermissible conjecture and speculation. *See Schulz v. St. Mary's Hosp.*, 81 Wis.2d 638, 658, 260 N.W.2d 783, 790 (1978).

We are not persuaded by Taylor's argument that the verdict shows the absence of jury prejudice. The jury found that the absence of smoke detectors was not a substantial factor in causing the deaths even though Steven and the two children died only a few feet away from a door that would have led to safety. The jury also found that Debra should be awarded no damages for the loss of society and companionship of her husband and two children and no damages for past and future mental distress. Despite other findings favorable to Debra, we cannot conclude that the error of allowing this irrelevant testimony was harmless.

The court erred when it concluded that Steven was negligent per se for ingesting marijuana before the fire. The trial court concluded that the statutes prohibiting possession or use of marijuana are "safety statutes." Safety statutes are designed to protect a certain class of people from a particular type of harm. *See Grube v. Daun*, ___ Wis.2d ___, ___, 563 N.W.2d 523, 528 (1997). Statutes that are designed merely to protect the general public are not safety statutes. The marijuana provisions of the Uniform Controlled Substances Act are not designed to protect a certain class of persons from a particular harm. While the jury would be allowed to find Steven negligent for ingesting marijuana, the trial court erred when it concluded that he was negligent per se for violating the Uniform Controlled Substances Act. Therefore, we remand the cause for a new trial at which drug-related evidence is admissible only with regard to Steven's impairment on the night of the fire and the question of Steven's negligence for ingesting marijuana will be left to the jury.

By the Court.—Judgment reversed and cause remanded.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

